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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 685

LESLIE L. CONNER, *Petitioner,*

v.

A. J. SIMLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement	4
The Present Litigation	7
The Unchallenged Basis of Summary Judgment	10
Reasons for Granting the Writ	14
Argument	16
Conclusion	29
Appendices:	
A. Order Sustaining Motion	1a
B. Judgment of Court of Appeals	4a
Opinion of Court of Appeals	5a
C. Order Denying Rehearing	11a

AUTHORITIES CITED

CASES:

Beacon Theatres v. Westover, 359 U. S. 500	27
Ettelson v. Metropolitan Life Insurance Co., 137 F. 2d 62, cert. den., 320 U. S. 777	20, 21
Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F. 2d 793	16
Franklin Life Ins. v. Talkinghan, 229 F. 2d 300	21
Gifford v. Travelers Protective Asso., 153 F. 2d 209	17
Haunstein v. McCalister, (Okla.) 172 P. 2d 613	9
Herron v. Southern Pacific Co., 283 U. S. 91	21
Hickman v. Taylor, 329 U.S. 495	15
Hoffman v. Blaski, 363 U. S. 335	16
Jackson County v. United States, 308 U. S. 343	20

	Page
Johnson v. Nationwide Mut. Ins. Co., 276 F. 2d 574	16
La Buy v. Howes Leather Co., 352 U. S. 249	15
Lindsey v. Leavy, 149 F. 2d 899	28
Matter of Peterson, 253 U. S. 300	28
Miller v. Pyrites, 71 F. 2d 804	29
Miner v. Atlass, 363 U. S. 641	22
Morgantown v. Royal Ins. Co., 337 U. S. 254	29
New Century Cas. Co. v. Chase, 39 F. Supp. 768	16
O'Brien v. Western U. Teleg. Co., 113 F. 2d 539	20
Pen Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F. 2d 871	19
Prudence Realization Corp. v. Geist, 316 U. S. 89	20
Roche v. Evaporated Milk Assoc., 319 U. S. 21	23
Rosebloom v. Baughman, 37 P. 2d 616	19
Royal Indem. Co. v. United States, 313 U. S. 289	20
Schilling v. Rogers, 361 U. S. 867	22
Securities and Exchange Commission v. Payne, 35 F. Supp. 873	28
Sibbach v. Wilson and Company, 312 U. S. 5	15
Simler v. Conner, 282 F. 2d 382	9
Simler v. Wilson, 210 F. 2d 99, cert. den., 347 U. S. 954	6
Simler v. Wilson (Okla.), 308 P. 2d 304	6
Sola Electric Company v. Jefferson Electric Company, 317 U. S. 173	20
Thomas v. Wilson, 185 P. 2d 473	19
Town of River Junction v. Maryland Casualty Company, 110 F. 2d 273, cert. den., 310 U. S. 634	17
United States v. Daubendick, (D.C. N.D. Iowa) 25 F.R.D. 50	19
Wilkerson v. McCarthy, 336 U.S. 53	23

STATUTES:

Rule 56(c), F. R. Civ. P., 28 U.S.C.	2, 14, 16, 18, 19, 21, 25, 26
28 U.S.C. 2201	2
28 U.S.C. 1291	3, 23
28 U.S. § 2072	15
Section 7, Oklahoma Stat. Ann. 1951	6
Sections 556, 557 Oklahoma Stat. Ann., 1951	27

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Tenth Circuit, entered in this cause on September 3, 1960.

OPINION BELOW

The District Court entered a Summary Judgment in favor of the Petitioner which appears in the original record certified to this Court and in Appendix A. The opinion of the Court of Appeals, Tenth Circuit, reported at 282 F. 2d 382, appears in Appendix B.

JURISDICTION

The judgment of the Court of Appeals, Tenth Circuit, was entered on September 3, 1960. Rehearing was denied on September 27, 1960. (Appendix C.) On December 19, 1960, by order of Mr. Justice Whittaker, the time within which to file a petition for a writ of certiorari was extended to January 30, 1961. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Rule 56(c), Fed. Rules Civ. Proc., 28 U.S.C.

> "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

28 U.S.C. § 2201

> "§ 2201. Creation of remedy
>
> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 1291

"§ 1291. Final decisions of district courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

QUESTIONS PRESENTED

1. When the District Court explicitly found that no issue of fact existed and no evidence of fraud was presented, whether a Court of Appeals can set aside a summary judgment for Petitioner and order a jury trial on the issue of fraud, without determining that an issue of fact was present?

2. Whether a Court of Appeals can set aside a summary judgment for Petitioner which is rested upon two independent, self-sufficient grounds, without finding that neither ground is sufficient in law to support the judgment?

3. Where the District Court has found there is no issue of fact, and that "there is no evidence of fraud" whether a Court of Appeals may, without rendering Rule 56 of the Federal Rules of Civil Procedure meaningless, reverse a summary judgment and require a jury trial as to the existence of fraud, basing its reversal on a state rule of substantive law as to fraud? and whether such action is not an invasion of the discretionary function of the District Court under Rule 56?

4. Whether a Court of Appeals can set aside a summary judgment of a District Court rendered in ac-

cordance with Rule 56 of the Federal Rules of Civil Procedure, a decision on procedure in a federal court, and on grounds purely and solely derived from local (state) law, order a jury trial?

5. Whether a Court of Appeals can require a District Court by a writ of mandamus to submit to a jury an issue of fact, without determining that such an issue exists? Whether this violates the trial court's duty and right to determine whether an issue, in fact, exists?

STATEMENT

Birdine Fletcher, whose sole and only heir was A. J. Simler, the respondent, chose to leave him in her will "the sum of $1.00." She died in July, 1952. On July 18, 1952, Simler engaged the Petitioner, Leslie L. Conner, a member of the Oklahoma bar, to represent him in contesting the will. The following letter addressed to Conner and signed by Simler embodied the agreement: (R. 66)

July 18, 1952.

Mr. Leslie L. Conner, Atty.,
410-414 Hightower Bldg.,
Oklahoma City, Oklahoma.

Dear Sir:—

Re: BIRDINE FLETCHER ESTATE
COUNTY COURT OKLAHOMA COUNTY,
OKLAHOMA.

This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court; if the matter is successful either by trial or judgment or compromise.

If the matter is not, won, compromised or settled you are not to charge us a fee.

Yours truly,

/s/ A. J. SIMLER
A. J. Simler, for himself and his children.

Two months later, Conner held a conference with Simler at his office to discuss the proposed Federal litigation, attacking the validity of the residuary bequest in the Fletcher will. Another attorney, Arnold Britton, was present. Conner proposed to employ two other Oklahoma City attorneys to assist him in the proposed Federal litigation, all of which was explained to Mr. Simler. In order to employ them it was necessary that Conner assign them a part of his contingent fee-contract of July 18, 1952. Having agreed on a reasonable graduated scale of contingent fees, the parties reduced it to writing; not as a new employment contract, but merely clarification of the original July 18,

1952, contingent-fee contract.[1] The letter was signed by Simler. The letter itself is the clearest exposition of its terms. (R. 68)

September 25, 1952.

Mr. Leslie L. Conner
Conner, Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma.

Dear Sir:—

With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33⅓% of the amount recovered if the case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

I understand that all expenses, taxes, and costs are to be deducted first.

This is a contingent fee and if nothing is recovered, no fee is to be paid.

If anything is recovered or settled, I agree to pay you the above fees.

Yours truly,

/s/ A. J. SIMLER
A. J. Simler.

[1] Section 7, Oklahoma Statutes, provides that attorneys may contract for contingent fees "not to exceed fifty per centum."

The litigation began on October 2, 1952, in the County Court. On October 14, 1952, on Simler's written authorization (R. 69), the federal action was initiated to challenge the validity of the devise of an oil producing farm to a foreign corporation. It continued through nineteen separate cases, proceedings and appeals until May, 1957. (See R. 556, et seq.)

The Court of Appeals in *Simler* v. *Wilson* (C.A. 10), 210 F. 2d 99 (1953), ruled in Simler's favor that the foreign corporation was ineligible under Oklahoma law to take the Caddo County Oil farm and that as to it Birdine Fletcher died intestate. This Court denied certiorari, *Wilson* v. *Simler*, 347 U.S. 954. On November 30, 1954, the Oklahoma County Court entered a final decree awarding the farm and all income therefrom to Simler from the date of his sister's death.

Thereafter, Conner litigated an appeal on behalf of Simler from the portion of the decree which ordered the costs, taxes, legacies, and expenses of litigation paid from farm proceeds. This resulted in preventing $73,000 in legacies from being paid from Simler's inheritance. *Simler* v. *Wilson* (Okla.) 308 P. 2d 304.

Until Simler took possession of the Caddo farm in December, 1954, he never questioned the terms under which he had engaged the services of the Petitioner. Then, with possession of the farm achieved for him by Conner's efforts, he first exhibited signs of repudiating the agreement.

The Present Litigation

In April, 1958, Simler, the respondent, filed a suit for a declaratory judgment of whether Conner was entitled

to a fifty per cent fee as promised in the letter of September 25, 1952, or a fixed cash fee. The suit was brought in the United States District Court for the Western District of Oklahoma on the ground of diversity of citizenship, petitioner being a citizen of Oklahoma and Simler a citizen of Arkansas.

On November 23, 1959, Conner moved for summary judgment. During the course of several hearings of the motion, Simler sought to compel a jury trial by means of mandamus from the Tenth Circuit Court of Appeals. Mandamus issued on January 7, 1960, directing the District Judge to submit all disputed issues to a jury, but the order provided that it was "*not to be construed*" to prevent the trial judge from granting summary judgment if he "*determines such disposition to be required or proper in law.*" (R. 957)

On January 12, 1960, summary judgment for Petitioner was granted (App. A). Judge Chandler stated his reasons in part as follows:

> That there is no issue of fact concerning the circumstances under which the letter of September 25, 1952 came into existence in which the parties themselves fixed the percentage of recovery to be realized by defendant as his contingent attorney fee provided in the letter of July 18, 1952; and there is no evidence of fraud, overreaching or misconduct on the part of the defendant which would form any basis to set aside or disregard the letter as a part of the contract between the parties.
>
> That under the terms of the letter of July 18, 1952, properly construed and interpreted, even if the parties had not thereafter agreed upon the percentages, the contingent fee was to be set by the Court without a jury and the Court finds from the undisputed facts as to the services rendered that

a reasonable contingent fee for the services of the defendant in this cause is 50% of the real and personal property recovered after payment of the expense of the litigation.

. . .; that defendant performed legal services for and was attorney for plaintiff in some 19 separate cases in the State Courts and Supreme Court of Oklahoma, the Federal Courts, the Court of Appeals and the Supreme Court of the United States; that defendant has fully performed his contract and plaintiff has accepted the benefit of defendant's services all with full knowledge that he was proceeding under said contingent fee contract composed of both of the aforesaid letters.

Judge Chandler further decreed that petitioner owned one-half of the Caddo farm and was entitled to one-half of the accumulated income therefrom, after payment of various expenses out of it.

Respondent appealed to the Tenth Circuit Court of Appeals and the trial court was reversed on September 3, 1960. Rehearing was denied on September 24, 1960. *Simler* v. *Conner*, 282 F. 2d 382 (App. B).

The Court of Appeals (Pickett, J.) based its reversal on these grounds:

1. Under Oklahoma law, contracts between attorney and client are presumed fraudulent, and the attorney has the burden to establish the absence of fraud, citing the Oklahoma decision of *Haunstein v. McCalister*, 46 P. 2d 552.

2. The letter of September 25 was an adjustment of the original contract and subject to the rule pronounced.

3. The question of the presence of fraud should have been submitted to a jury.

The Tenth Circuit opinion cited Oklahoma cases for its first point, *but no cases for either of the other two points.* It did not state that the findings of the trial judge that there was no issue of fact and that no evidence of fraud existed were erroneous. It did not even discuss the findings or decision of the trial judge beyond the bare notation that he had granted summary judgment for petitioner.

The Unchallenged Basis of the Summary Judgment

Judge Chandler, as petitioner has already mentioned, held several hearings on the motion for summary judgment. It was his conclusion after respondent had had ample opportunity to demonstrate otherwise, that

1. There was no issue of fact.

2. There was no evidence of fraud.

3. If, *for any reason,* the September letter was inoperative, then Petitioner was entitled to a fifty per cent fee anyway, under the terms of the July letter contract.

These findings and conclusions were based upon the plain language of the letters quoted in full above at pages 4 and 6. In addition, the judge had before him the depositions of both parties and of Arnold Britton, the other person present when the September 25th letter was signed. These appear at R. 707, R. 857, and R. 955. Pertinent excerpts are set out below:

1. From Mr. Conner's:

> A. I can't answer your question except that that is our contingent fee contract. All this letter of

September 25th, 1952, does to the letter of July 18, 1952, is for him and I to determine what the word reasonable fee meant, and it inured just as much to his benefit as it did to mine. Now, another thing, another thing, Mr. Ogden, that might have brought this thing about, I had discussed this matter as I recall, with Mr. Grigsby, about employing him on a contingent fee contract in this case, and he said, 'How have you been employed?' And I showed him my July 18th employment, and I think that either he or Mr. Britton was talking about that we had better find out from Mr. Simler or agree with Mr. Simler what a reasonable fee would be, and that may be another thing that brought this thing about." (R. 711 et seq.)

2. From Mr. Simler's:

The Witness: I signed it for one reason because they talked in such a manner that it would just be impossible for them to continue the case unless they got a stronger, more assured contract than they had before, that it was a reasonable contract and they didn't think that that was, in other words, sufficient for all the litigation they were going to have and at the same time they assured me that they had the will case by hiring Mr. Daugherty, that they had the will case finally froze up. Now, I don't say that they hired Mr. Daugherty at this time, but they did right shortly after that and he informed me that he was going to hire some other lawyers, but he didn't tell me who they were, but he said he had a good will case man. (R. 860)

3. From Mr. Britton's:

Q. All right, sir. Now when you called Mr. Simler down on the 25th of September, 1952, was Mr. Grigsby there?

A. I don't remember.

Q. Well, when this letter was signed, you don't know who was there then?

A. Well, I am sure that I was there, and I am sure that Mr. Conner was there, but I don't remember for sure whether or not Mr. Grigsby was there.

Q. Would you tell the court and jury why you said to Mr. Conner and Mr. Conner to you—Would you tell the court and jury what you said to Mr. Conner and Mr. Conner to you, and either one of you to Mr. Simler about this letter here dated the 25th of September, 1952, signed by Mr. Simler?

A. What was said to Mr. Simler?

Q. Yes.

A. Well, I think I have answered it once, but I will try to do it again.

Q. Well, I do not recall it, if you did.

A. That we just felt like because of the mass litigation that was going on and for the protection of everyone concerned, both Mr. Simler and to Mr. Grigsby, Mr. Conner and myself, that the amount of the fee ought to be set out with particularity so that we would know where we were and that that was more or less a standard amount and we thought that it was a fair and reasonable fee, and I can't say to you that Mr. Simler was gleeful or enthusiastic about it, but the fact remains that he did sign it. (R. 955-1)

In addition, Judge Chandler held a pre-trial conference and several hearings on the Motion for Summary Judgment, the records of which were transcribed and appear at R. 595, 994, 1030 and 1053. At one of these hearings (R. 595 at Pages 60-65) Judge Chandler made the same request of respondent's counsel that Judge Wallace had previously made, "Who are your witnesses and what evidence will you produce to prove your allegations of fraud?"

The Court: What additional testimony? I don't want to know what it is, but on what point would you offer additional testimony?

Mr. Ogden: Well, if your Honor please, of course, we would naturally offer evidence to show what a reasonable fee was in a case of this kind.

The Court: Of course.

Mr. Ogden: That is one thing we would naturally do, because we think that would be proper. And then next, if your Honor please, Mr. Simler has testified he doesn't desire to change his testimony, but we do desire to corroborate it with other testimony which we think we have at the time.

The Court: How could there be any other testimony on that point?

Mr. Ogden: Well, Mr. Conner and Mr. Simler are in complete disagreement in this on what took place.

The Court: There are only the two of them who were there.

Mr. Ogden: Well, if your Honor please, I'm not saying—well, there was other people there, though, Judge.

The Court: Whose testimony are you going to rely on to add to it?

Mr. Ogden: Well, I think I'm going to rely on Mr. Arnold Britton. Mr. Arnold Britton sued Mr. Simler for attorney's fee.

The Court: You are going to use Mr. Britton now? What are you going to prove by him?

Mr. Ogden: Judge, I've got his deposition and as I recall it, he testifies in that deposition, I don't attempt to remember it in detail, but as I recall it, he testifies that it was after this county court case which was October the 2d, that Mr. Grigsby got up the idea to file this case in the Federal Court, that Mr. Conner had nothing to do with it, hadn't even thought about it, knew nothing about it; that Mr. Grigsby filed it and Mr. Grigsby went to Denver and argued it at the Bar.

Compare what Ogden said Britton would say with what Britton actually testified to as set out supra. There was no issue of fact. There was not even the suggestion of fraud.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit Court of Appeals in this case cannot be left undisturbed and it is imperative that this Court correct the errors involved, for several reasons, any one of which qualifies for review by this Court, but which, taken together show a compelling need for this Court's attention. The Tenth Circuit is in a state of confusion as to its relation as an appellate tribunal to the trial courts subject to its supervision.

In this case, the Tenth Circuit overturned a summary judgment for petitioner and committed these errors in the process:

1. It failed to apply correctly Rule 56 F.R. Civ. P., by ignoring the trial judge's express finding that there was *no issue of fact*, and moreover *no evidence of fraud*.

2. It ignored the second ground of the summary judgment entirely—that even if the September contract was ineffective—that petitioner was entitled to a 50 percent fee, determined by the District Court—in accordance with the original July contract. This was violative of Rule 56.

3. It purported to decide a question of procedure in a Federal Court on the basis of state law only. In fact, it held that Oklahoma law required a jury trial on the question of the existence of fraud, *because* under Oklahoma law, the burden is on the attorney to show the absence of fraud in an attorney-client contract. This was a classic non-sequitur, as well as a gross error in federal procedure.

4. It came into conflict with the Fourth and Ninth Circuits, in the test to be applied to the appellate review of a summary judgment.

5. The joint effect of its mandamus order and its review of the summary judgment was to take from the trial court its right to exercise discretion in granting summary judgment and thus preclude a jury trial. The logical result of this is that a District Court under the Tenth Circuit may not be able to deny a jury trial in any case.[2]

Congress by 28 U.S.C. Section 2072 has empowered the Supreme Court to prescribe by general rules for the District Courts of the United States the form of process, writs, pleadings, and motions and the practice and procedure in civil actions. These rules have the force and effect of a Federal statute, and the Court may not ignore them. *Sibbach* v. *Wilson and Company*, 312 U.S. 5, 13. The whole field of District Court procedure is regulated in the interest of speedy, fair, and exact determination of the truth. This petition raised important questions of the administration of the rules. This Court has granted certiorari in cases where an important question involving the interpretation of the Federal Rules of Civil Procedure has been presented. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, reh. den. 352 U.S. 1019, *Hickman* v. *Taylor*, 329 U.S. 495.

[2] It is bemusing that the Tenth Circuit in reversing this case found itself violating its own mandamus provision that summary judgment could be granted if the District Judge determined that no factual issue was present.

ARGUMENT

I. The Opinion Is in Direct Conflict With Holdings of the Other Courts of Appeals on This Matter

Where conflict had arisen among the circuits in the interpretation and application of Federal statutes with respect to transfer of civil actions in District Courts, certiorari was granted *Hoffman* v. *Blaski*, 363 U.S. 335, 4 L. ed. 2d 1254.

The Tenth Circuit in this case is in conflict with other Courts of Appeal in the test it requires to be applied by the District Court when entertaining a summary judgment motion. It requires a trial judge when presented with that motion to look first to the state decisions and law to determine whether the case should be submitted to a jury and if a jury trial is proper then the action for summary judgment must be overruled. By the unambiguous terms of Rule 56 this is an erroneous test.

"Rule 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. provides that summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. That Rule 56(c) applies to declaratory judgment actions is shown by 6 Moore, Federal Practice, ¶ 56.17(19) at 2209 (2d ed. 1953). See also *Farm Bureau Mut. Auto Ins. Co.* v. *Hammer*, 4 Cir., 1949, 177 F. 2d 793; *New Century Cas. Co.* v. *Chase*, D.C. S.D. W. Va. 1941, 39 F. Supp. 768."—*Johnson* v. *Nationwide Mut. Ins. Co.*, 276 F. 2d 574 (C.A. 4) 1960.

It is obvious that the Tenth Circuit conflicts with the Fourth in defining the test to be applied in deciding motions for summary judgment.

The Tenth Circuit in effect says that a judge must grant a jury trial regardless of whether there is a genuine issue of any material fact. The Court of Appeals, Ninth Circuit, in the case of *Gifford* v. *Travelers Protective Association of America*, (C.A. 9, 1946) 153 F. 2d 209 held that the question presented by a motion for summary judgment is whether or not there is a genuine issue of fact and not how that issue should be determined. In the case of *Town of River Junction* v. *Maryland Casualty Company*, (C.A. 5, 1940) 110 F. 2d 273, 283, cert. den. 310 U.S. 634, it was held:

> "That rule contemplates that the District Judge shall take the pleadings as they have been shaped to see what issues of fact they make and then shall consider the 'depositions and admissions on file together with the affidavits' to see if any such issues are real and genuine. If they are not, judgment is given without further trial."

A motion for summary judgment requires the court to determine:

1. Is there a genuine issue of any material fact, and
2. If there is no genuine issue of any material fact, is the moving party entitled to a judgment as a matter of law?

This test is the same whether the case may be triable to a jury or to the court without a jury.

The Tenth Circuit has repudiated this test and in plain language states that if the case is the type of case which should be tried to a jury, by authority of state law, then a motion for summary judgment must be denied. This would require a trial judge to submit all evidence to a jury even though a genuine issue of a material fact does not exist.

II. The Tenth Circuit Failed to Follow Rule 56(c)

The pertinent portion of Rule 56(c) reads:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In overturning the judgment for petitioner, the Tenth Circuit ignored this clear language as well as the trial judge's finding in accordance with the Rule that there was no issue of fact in the case. The trial judge went further. He found there was no *evidence* of fraud. Having reached these findings, he concluded as a "matter of law" that petitioner was entitled to judgment.

But the Tenth Circuit in effect ignored Rule 56 in reversing. Instead it discussed the Oklahoma rule that attorney-client contracts made after the relationship has begun are presumptively fraudulent and that it is the attorney's burden to prove that fraud is absent. Conceding that such is a correct statement, how does this affect the summary judgment here?

The trial court after several hearings and after reviewing the depositions before him, and after querying respondent's counsel as to his proposed evidence, found that there was no dispute as to the facts surrounding the contract. Moreover, he found that there was no "fraud, overreaching, or misconduct" by petitioner. There being no dispute as to the facts and no evidence of fraud, Rule 56 compelled the rendering of summary judgment for petitioner.

There were no facts or evidence of fraud on which to ground a fraud finding.

The Oklahoma rule is that the attorney has the "burden" to show the absence of fraud, and petitioner sustained that burden. The trial judge's finding confirmed that the burden was sustained by the pleadings, depositions and affidavits filed in the case. The Tenth Circuit erred when it held, in effect, that the decision as to whether petitioner sustained the burden *had to be made by a jury.* There is no hint in the cases cited by the Tenth Circuit that the fact that the burden of proof is on the attorney in this type of case requires that the case must go to a jury. In fact in two cases cited which involved this "burden," the decisions were rendered by the court. *Roseblоom* v. *Baughman* (Okl.) 37 P. 2d 616 and *Thomas* v. *Wilson,* (Okl.) 185 P. 2d 473.

The question the Tenth Circuit neglected was whether any issue of fact was present in the case. If no factual issue was present, summary judgment was appropriate under Rule 56. *United States* v. *Daubendiek,* (D.C. N.D. Iowa, 1959) 25 F.R.D. 50, 56-57. Petitioner moved for summary judgment and showed that no issue of fact as to the fee to be charged respondent existed. It was then incumbent upon respondent to dislodge this showing by petitioner. *Pen-Ken Gas & Oil Corp.* v. *Warfield Natural Gas Co.,* (C.A. 6) 137 F. 2d 871, 877. He failed to do this because his representation of the facts involved was identical to that of petitioner. "Mere formal denials or general allegations . . . are insufficient to prevent the awarding of a summary judgment." *United States* v. *Daubendiek, supra,* citing numerous decisions.

In certain cases where Federal law is applicable, this Court has set out to affect a uniformity of decision throughout the entire Federal judicial system. This underlying theory of uniformity of decision in cases where Federal law is applicable was stated by this Court in the case of *Sola Electric Company* v. *Jefferson Electric Company*, 317 U.S. 173. This Court held:

> "But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indem. Co.* v. *United States*, 313 U.S. 289, 296; *Prudence Realization Corp.* v. *Geist*, 316 U.S. 89, 95; *Jackson County* v. *United States*, 308 U.S. 343, 349 350; Cf. *O'Brien* v. *Western U. Teleg. Co.* (CCA 1st) 113 F(2d) 539, 541."

At page 10, (Appendix B) of the opinion of the Court of Appeals that Court said:

> "We are convinced that under the well established principle of law in Oklahoma, the case should have been submitted to a jury on the question of whether the September 25th contract was fair, just and equitable and free from fraud."

In *Ettelson* v. *Metropolitan Life Insurance Company*, (3rd Cir.) (1943) 137 F. 2d 62 cert. den. 320 U.S. 777 the Court said:

> "Well considered Federal decisions have held that the division of function between Court and jury in a Federal Court is to be made by Federal, not State law."

The Tenth Circuit misconstrued the statutory law of Oklahoma and the decisions of the Oklahoma Su-

preme Court. Thus, under *Ettelson*, the Tenth Circuit's holding quoted supra is erroneous on its face. It overlooked the provisions of Rule 56(c) of the Federal Rules governing Summary Judgment and made no reference to the rules or decisions on summary judgments in the Federal Courts.

Even if Oklahoma had such a rule requiring a jury trial, which it does not, it could not be used to interfere with the function of a Federal Judge. In *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 94, this Court held:

> "state statutes which would interfere with the appropriate performance of [the judge's function] are not binding upon the Federal Court. . . ."

What is said of state statutes in that case is applicable to state court-made law. The discretion of a Federal Judge in granting or denying summary judgment or jury trial in a Federal Court may not be bound by a local rule of burden of proof.

In *Franklin Life Ins.* v. *Talkinghan*, 229 F. 2d 300, a case involving a Texas insurance contract in a suit in Illinois in the U. S. District Court, the court succinctly assigned what law governed each aspect of the case:

> "The evidence shows that the policy in this case was delivered in Texas and its nature, validity and construction must be governed by the law of that state, ... Questions . . . relating to remedies are governed by the law of the forum, which is Illinois . . . . Questions relating to jurisdiction, procedure and practice are governed by Federal law."

Certiorari should be granted to review the question of whether the Court of Appeals erred in reversing to

require a jury trial solely because of state law. Proper administration of the Declaratory Judgment Act and the Rules of Civil Procedure as to summary judgments is involved. In *Miner* v. *Atlass*, 363 U.S. 641, 4 L. ed. 2d 1462, 1463, this Court granted certiorari to settle a conflict between the District Court and the Court of Appeals in applying the Admiralty Rules. See also *Schilling* v. *Rogers*, 4 L. ed. 2d 1478, 1482; 361 U.S. 867. (Certiorari granted because of the "importance of the question in the proper administration of the Trading With the Enemy Act . . . .")

III. The Summary Judgment Rested Also Upon the Undisputed Original Agreement

The Tenth Circuit's opinion does not touch upon the alternate ground of the summary judgment. The trial judge held that even if the September letter was inoperable, the July letter was an adequate basis to award a 50% fee to the petitioner.

The July 18, 1952 letter, set out at p. 4, *supra*, provided for a "reasonable" fee, "which fee may be set by the County Court or any other court." The District Judge found "from the undisputed facts" that "a reasonable contingent fee" was 50%. (App. A) This judgment rests solely upon the original agreement, made as contemplated therein, and is unaffected by any alleged fraud connected with the second letter.

Only indirectly does the Tenth Circuit deal with this question. It recited that it had issued a mandamus order pronouncing respondent's right to a jury trial on the reasonableness of a fee.

The Tenth Circuit, of course, does not share petitioner's view that its mandamus order was an im-

proper attempt to usurp the trial judge's discretion in allowing or denying a jury trial. But, it was clear to the trial judge (1) that the original agreement did not contemplate a jury-set fee; and (2) that there was no issue of fact on the reasonableness of the 50% fee. Seeing that there was nothing to submit to a jury, the trial judge did not choose the "easy but timid way out," mentioned by Justice Frankfurter in his concurring opinion in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 65, that is, to leave all cases to a jury, thus failing the judicial duty to take cases from the jury when the evidence does not warrant, sending them to the jury.

The respondent came into court and asked for a declaratory judgment to establish what was a reasonable fee. The court in this alternate basis of judgment, took him at his word. First, it construed the July letter as agreeing that a court, without jury, could set the fee. It then, finding no issue of fact involved, set the fee at 50%.

IV. Improper Use of Mandamus to Interfere With Trial Judge

The court erred in holding that by the mandamus action it had directed the lower court to grant Simler a jury trial and so interpreted its own judgment entered in the mandamus action. The mandamus action was improper and the Court of Appeals could not control the discretionary powers of the District Court by mandamus. Title 28 U.S.C.A. § 1291.

In *Roche* v. *Evaporated Milk Assoc.*, 319 U.S. 21. this Court held:

> "As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute

to those cases in which the writ is in aid of that jurisdiction." (Id. at 25)

". . . while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute." (Id. at 26)

In this case, the Court of Appeals improvidently granted the writ of mandamus and compounded its improvidence by using the writ as a foundation for its subsequent opinion.

The respondent, after obtaining a transfer of the case from Judge W. R. Wallace's docket to Chief Judge Stephen S. Chandler, filed in the Court of Appeals, Tenth Circuit, a petition for a writ of mandamus seeking to compel Judge Chandler to grant him a jury trial. On January 7, 1960, the Court of Appeals considering the petition as an application for an order to file a petition issued the following order directed to Judge Chandler:

"Treating the petition for a writ of mandamus as an application for leave to file a petition for mandamus, it is now here ordered that said application for leave to file be and the same is hereby granted, and upon consideration of the petition for a writ of mandamus and the files and records in support thereof, it is hereby ordered:

1. That the Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, is hereby directed and ordered to vacate all orders heretofore entered by the United States District Court for the Western District of Oklahoma denying a jury trial to the plaintiff in that certain action entitled A. J. Simler, plaintiff, v. Leslie L. Conner,

defendant Civil No. 8008, and submit to a jury for determination all disputed issues of fact, arising in such action.

2. *That this order is not to be construed as to have any application to the duty and right of the court to determine what, if any, disputed issues of fact exist in said action, or to the right of the court to dispose of the action summarily if the court, in the exercise of its sound judicial judgment, determines such disposition to be required or proper in law.*" (Emphasis added) (R. 957)

In compliance with the first part of the mandamus order Judge Chandler vacated all orders denying Simler a jury trial. Then, assuming that the second paragraph of that order meant what it said, Judge Chandler, in the proper exercise of his judicial discretion, examined all the testimony included in the depositions of the parties on file, their pleadings and admissions, and determined there was no genuine issue of any material fact in the action, and, acting under the applicable provisions of Rule 56(*c*) of the Federal Rules, entered a judgment for petitioner.

When this judgment was appealed by Simler to the Tenth Circuit, that Court stated in its opinion reversing Judge Chandler that it had ordered Judge Chandler to grant Simler a jury trial. We quote from that opinion. (Appendix B):

> "We held in the mandamus action that Simler was entitled to a jury trial on the question of the reasonableness of a fee."

There was no such holding in the mandamus order, and if there were, the Court of Appeals was clearly without authority to order Judge Chandler to submit that question to a jury. We call attention to the

following language of that Court's opinion (Appendix B):

> "Thereupon Simler brought mandamus proceedings in this court in which he sought an order directing the District Court to submit the issue to a jury. On January 7th, 1960, an order was entered directing the District Judge to vacate all orders theretofore entered denying the jury trial to the plaintiff and to submit for determination all disputed issues of fact arising in said action. *Defendant's motion for summary judgment was pending and the order provided that it was not to be construed to affect the right of the District Court to dispose of the action summarily.*" (Emphasis added)

On one hand the Court of Appeals says that Simler was entitled to a jury trial on all disputed issues of fact and in the same paragraph of the opinion says that the trial judge could dispose of the matter summarily. But when Judge Chandler did enter a judgment summarily the Court of Appeals reversed him and directed a jury trial.

Such a holding by the Court of Appeals destroys the plain provisions of Rule 56(*c*), governing summary judgments in the federal courts. That rule makes it the duty of the trial judge, when a motion for summary judgment is filed, to search the record for any genuine issue of fact that exists in the action; and if he finds none to enter judgment forthwith.

The rule is too well established to require argument or citation of authorities that a superior court cannot control the discretion of an inferior court having jurisdiction of the matter unless there exists a statute, or court decisions, requiring certain specified issues of fact sent to a jury; for example: the question of

treble damages in anti-trust suits. See *Beacon Theatres v. Westover*, 359 U.S. 500, 504.

There is no federal statute that requires the question of attorney fees to be sent to the jury. In the case of *U. S. v. Anglin and Stevenson*, 145 F. 2d 622, (10th) (1944), the Court allowed 25 percent of estate or $250,000 attorney's fees, plus reimbursement of expenses on recovery of $1,000,000 with five year's work and the court fixed the reasonable attorney's fee in the absence of a jury. The State of Oklahoma has no such statute. The only issue of facts which must be sent to a jury in Oklahoma are those provided for by Section 556 and 557, Title 12, Oklahoma Statutes Annotated 1951:

> "Section 556. Issues of law must be tried by the Court unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as hereinafter provided.
>
> "Section 557. All other issues of fact shall be tried by the Court, subject to this power to order any issue or issues to be tried by a jury, or referred as provided in this code."

The present action is an action for a declaratory judgment in the Federal Court, based upon the Declaratory Judgment Statutes and the Rules of Civil Procedure. It seeks no money judgment, nor real or personal property, but seeks only to determine what fee, if any, Simler owes Conner for legal services rendered in the Federal court. He admits he owes him; he wants to know how much.

V. Court of Appeals Allowed Piecemeal Appeal

There is no material question of fact from all the evidence in this case to submit to a jury. The case, being a declaratory judgment action involving the interpretation of a written contract, did not require a jury.

The Court of Appeals erred in the first instance by allowing Simler to appeal this case in a piecemeal fashion. The presentation of the Motion for Summary Judgment covered several days and at the close of the first day it was evident that the Court was going to sustain Conner's motion for summary judgment, but the hearing was continued for further argument. Before the hearing was reconvened, Simler filed a Petition for Writ of Mandamus in the Court of Appeals, Tenth Circuit, on the ground that the trial court had denied plaintiff a jury trial. The Court of Appeals, treating the Petition as an application to file a Petition for Writ of Mandamus, entered the order. (App. C)

Other courts of appeals have held that the right to a jury trial is not denied simply because a motion for summary judgment is sustained. *Lindsey* v. *Leary*, C.C.A. Wash. 1945, 149 F. 2d 899, cert. den. 326 U.S. 783, *Securities and Exchange Commission* v. *Payne*, (D.C. N.Y. 1940) 35 F. Supp. 873 and *Matter of Peterson*, 253 U.S. 300, 310, is clearly in accord with this rule. In that case Justice Brandeis pronounced that, "No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined." Concisely that states the Constitutional justification for summary judgment.

The Tenth Circuit's opinion on its face denies Conner the right to move for a directed verdict or to seek any other procedural relief to which he may be entitled. It would require the court to overrule a Motion for Directed Verdict by Conner; because the opinion states unequivocally that a jury *must* determine this case. This is an abuse of power by the Court of Appeals and the opinion should be reversed and the judgment of the District Court should be reinstated. By permitting this piecemeal appeal, the Tenth Circuit has unwarrantedly attempted to control the trial judge's discretion before he had exercised it.

The grant or denial of a jury trial by a District Court is not an appealable order. *Morgantown* v. *Royal Insurance Co.*, 337 U.S. 254; *Miller* v. *Pyrites*, 71 F. 2d 804, cert. den. 79 L. ed. 696. Yet the Court of Appeals granted a mandamus order directing a jury trial of "disputed issues" in the case and now they construe it as directing the trial judge to grant a jury trial, whether he found "disputed issues" or not.

The District Judge found no issue. There was nothing to go to a jury. There is no right to a jury trial unless issues triable by a jury exist, but the Tenth Circuit conjured up a jury right, where no issues of fact existed, by mixing its unwarranted mandamus order with a misapplication of an Oklahoma rule on the burden of proof.

CONCLUSION

Summary judgment under the Federal Rules is intended to allow the proper law to be applied to undisputed facts without going into a useless trial. The trial court found the facts to be undisputed. The Court

of Appeals reversed *but it did not find any dispute.* It reversed because Oklahoma law put the burden to prove the absence of fraud on the attorney in this type of case. This is an unprecedented and extra-legal basis to reverse a summary judgment. It is in conflict with the test applied by other circuits. Moreover, the Tenth Circuit misconstrued the Oklahoma law; it misused its mandamus power and completely negated the District Judge's discretion in the area of granting or denying jury; as well as in the realm of summary judgment.

WHEREFORE, Petitioner prays that certiorari be granted and the judgment of the Court of Appeals reversed and the judgment of the trial court reinstated.

Respectfully submitted,

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